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Making the Law More Transparent

Text Linguistics for Legislative Drafting

By *Stefan Höfler*, Zurich

Abstract

An increasingly globalised and digitalised legal environment creates additional pressure for legislative texts to be drafted in a clear and transparent way. In this chapter, I argue that text linguistics can make a valuable contribution to how this goal can be achieved. To substantiate this argument, I provide specific examples from legislative drafting in Switzerland. I show how the concepts and methods of text linguistics can help drafters identify and remedy impediments to the transparency of statutes and regulations at a functional, thematic and propositional level of textual structure. I conclude the chapter with a summary of the challenges that lie ahead and the solutions I believe we need to devise to maintain the transparency of the law in a globalised world.

Keywords: legislative drafting, plain language, text linguistics, transparency

I. Introduction

Calls for the law to be more transparent are certainly not new, but they are still as relevant today as before. If anything, they have recently gained traction due to an increasingly digitalised and globalised world. There are at least two aspects to the problem: a substantive one and a formal one. From a substantive point of view, transparency means that the law should provide measures that allow for effective public oversight of all but the most confidential state activities. From a formal perspective, it implies that statutes and ordinances should be drafted in such a way that readers can easily recognise the legal rules established in these texts and how they may be affected by these rules. The formal aspect of transparency thus concerns the question whether, and to what extent, the content of legislative texts is reflected in their linguistic form, i. e. it concerns the strive for clarity. In the present chapter, I will focus on this second, formal aspect of transparency.

Calls for legislative texts to be drafted in a clear and transparent manner have been motivated, by and large, by a desire to improve the democratic legitimacy and public acceptance of the law, to ensure legal certainty and equality before the law, and/or to maximise the efficacy of the law and minimise the costs associated with administering it; these motivations have arguably been further accentuated in an increasingly digitalised and globalised world. For one thing, legislative texts have become more

readily available to ordinary citizens due to electronic publication. Nowadays it only takes a couple of clicks or a simple online search to gain access to statutes and regulations. This development is likely to cause a shift in the composition of the de-facto audience of legislative texts. Assessing the situation of legislative drafting in the Commonwealth, Xanthaki (2015: i) concludes that "with enhanced accessibility via electronic publication of legislation in many Commonwealth jurisdictions, drafters 'speak' not only to lawyers and judges, but also to untrained users." Indeed, a recent study has shown that a majority of those who access United Kingdom legislation via its official website are either laypeople or non-legal professionals (Bertlin 2014). For another thing, globalisation has resulted in an internationalisation of the law. Nowadays, the context in which a legislative text needs to be interpreted often transcends the legal system of the nation state. As a result, legislative drafters frequently face the challenge of having to coordinate the texts they are about to compose with legislative texts that use different legal concepts, different legal terminology, different drafting techniques and that are possibly also written in a different language. In addition, national legal systems are under increased pressure to incorporate legal rules developed in a supranational context. Arguably, both of these endeavours, coordination and incorporation, are more likely to succeed if the texts involved make it as transparent as possible what legal rules they establish.

In the present chapter, I will ask whether linguistics, and text linguistics in particular, can contribute to making legislative texts more transparent. To this aim, I will first discuss how the issue of transparency has traditionally been approached in the theory and practice of legislative drafting. In the main part of the chapter, I will then demonstrate how the concepts and methods of text linguistics can be employed to improve the transparency of legislative texts. Finally, I will ask what changes we need to see and what efforts are required to tackle the challenges that legislative drafting faces in an increasingly digitalised and globalised world.

II. Transparent drafting: Theory and practice

In the past, there has been considerable controversy over the question of whether legislative texts can and should be drafted in a clear and transparent language at all. In what follows, I briefly summarise the respective debate in German-speaking legal linguistics (see e. g. Lerch 2004; Eichhoff-Cyrus / Antos 2008); other jurisdictions have had similar discussions (see e. g. Wagner / Cacciaguidi 2008, Xanthaki 2014: 125 – 131). Among those participating in the debate, three major views can be identified. Following Nussbaumer (2004), I will refer to them as the idealistic, the sceptic and the pragmatic view, respectively. At one end of the spectrum, idealists call for laws that can be understood by everyone. According to this view, legislative texts can only obtain democratic legitimacy and guarantee legal certainty if those who are subject to the law can understand them, and if they can all understand them in the same way (cf. Klein 2004; Wesel 2004). At the other end of the spectrum, sceptics

question the very idea that legislative texts can and should be made more transparent. They point out that readers without legal training will never be able to grasp the legal consequences associated with the provisions stated in legislative texts. According to this view, therefore, it does not make sense to strive for transparency in legislative drafting, as this goal could not be achieved anyway (cf. Lerch 2008). On the contrary, trying to improve the transparency of legislative texts would then only mislead non-expert readers as it would suggest that they can understand what ultimately remains unintelligible to them (Ogorek 2004: 299 f.).

The idealist and the sceptic position are contrasted with a third, more pragmatic approach. This third view is based on the every-day observation that while there is, of course, no such thing as absolute transparency and texts will never be equally intelligible to everyone, a text can still present its content in a gradually more or less transparent manner (cf. Lötscher 2016). Experience furthermore shows that it is not only laypeople but also (and in many ways even primarily) legal experts who struggle with and complain about legislative texts that are difficult to understand because they have not been drafted in a sufficiently clear and transparent manner (cf. Griffel 2014). A lack of transparency in legislative texts often has practical consequences for the efficacy of the legal system as a whole: such texts result in legal decisions being less predictable, they give rise to more legal disputes and they generate unnecessary costs as it takes more time and effort to interpret them, which in turn means that the law will be administered less efficiently (cf. Schröder / Würdemann 2008: 326 f.; Müller 2014: 81 f.).

Based on such pragmatic views, many jurisdictions around the globe have recently taken measures to facilitate the production of legislative texts that are easier to understand and more transparent. Some countries have gone as far as to enact legal provisions stating that official documents such as statutes and regulations must be drafted in clear and transparent language. Examples of such provisions can be found, for instance, in the United States Plain Writing Act of 2010 (Publ.L. 111 – 274) and in Article 7 of the Swiss Languages Act of 5 October 2007 (SR 441.1). In common-law jurisdictions, the goal of plain-language drafting has often become a constituent part of the eduction of professional legislative drafters (cf. Xanthaki 2015; Uhlmann / Höfler 2016). In contrast, many civil-law countries, who do not usually employ professional drafters, have established specific institutions in their legislative process tasked with ensuring that new statutes and regulations are drafted in clear and transparent language. One example of such an institution is the Internal Drafting Committee of the Swiss Federal Administration (cf. Nussbaumer 2008; Höfler 2018). This committee, composed of lawyers as well as language experts, examines the wording of all drafts of statutes and regulations and makes suggestions as to how they could be formulated in a clearer and more transparent way. All administrative units in charge of a legislative project are obliged to formally consult the committee early on and repeatedly during the drafting process and to consider and discuss the suggestions the committee makes. Similar institutions can be found, for instance, in Germany (cf. Thieme / Raff 2017) or Sweden (cf. Ehrenberg-Sundin 2008).

Nonetheless, transparency continues to pose practical problems for those who are tasked with the composition of statutes and regulations. One of the reasons for this state of affairs is that suggestions as to how the clarity of legislative texts can be improved often content themselves with addressing issues of terminology and sentence complexity. In doing so, they neglect some crucial findings of linguistic research on text comprehension. Such research has shown that while the use of familiar words and straight-forward sentences certainly facilitates the comprehensibility of a text, it is even more important that the text enables its readers to construct a coherent model of its content: textual *coherence* (i. e. the semantic and pragmatic relations that hold between the segments of a text) and textual *cohesion* (i. e. the use of lexical items and syntactic constructions to express these relations) play a vital role in what makes a text understandable (cf. van Dijk / Kintsch 1983; Schnotz 2000; Christmann 2008).

An explanation of why legislative drafting guidelines frequently neglect this aspect of text composition can be found in the manner in which lawyers typically approach and apply legislative texts: statutes and ordinances are rarely read from beginning to end, lawyers rather pick out the paragraphs and sentences relevant to the case at hand (cf. Nussbaumer 1995: 96). As a consequence, legislative drafting guidelines tend to advocate a certain degree of de-contextualisation, stating that the individual provisions of a legislative text should, wherever possible, stand on their own, i. e. that they should be understandable and citable with as little recourse to context as possible. In many respects, one can thus identify two different perspectives on what legislative texts are: (a) relatively loose collections of individual provisions that can be understood without recourse to context, or (b) coherent texts made up of normative statements that exhibit rich pragmatic and semantic interconnections (Werlen 1994: 76). If the practice of legislative drafting is to take into account the findings of linguistic research on text comprehension, it will have to unify these two perspectives. In the remainder of this chapter, I will illustrate how text linguistics can contribute to achieving this goal.

III. Text linguistics at work

Text linguistics is a comparatively new linguistic sub-discipline concerned with investigating the linguistic properties of texts as a means of communication: it asks what texts are (i. e. how the notion of "textuality" can be defined), what genres of texts there are, what functions they serve and what structures they exhibit (cf. de Beaugrande / Dressler 1981; Brinker et al. 2000; Adamzik 2016; Hausendorf et al. 2017). On the one hand, text linguistics studies the genre-specific features of texts and the way in which these features interact with the specific communicative and institutional environments in which the respective texts are used. On the other hand, text linguistics is interested in the general cognitive mechanisms underlying textual communication at large (cf. de Beaugrande / Dressler 1981: 210).

One of the core findings of text linguistics is that text comprehension, i. e. the construction of a coherent mental model of the meanings conveyed by a text, comprises the processing of multiple layers of textual structure (cf. Brown / Yule 1983; Motsch 1996; Stede 2007). In order to understand what a text says, readers will have to grasp, among other things, the functional, thematic and propositional structures present in that text. For a text to be transparent, readers must thus be enabled to recover these three layers of text structure as easily as possible. In what follows, I will discuss what this finding means for legislative drafting. I will illustrate my considerations with examples from Swiss federal law and from the work of the aforementioned Internal Drafting Committee of the Swiss Federal Administration.[1]

1. Functional structure

Modern-day text linguistics takes an avowedly pragmatic perspective on texts: texts are considered instruments of communication employed to achieve a certain effect in the world, i. e. they serve a specific function. This function is determined by the genre to which a text belongs and the institutional context in which it is used. This also applies to statutes and regulations. As a genre, legislative texts are used to direct people's behaviour, to organise communal life, to control the directions in which society develops and to serve as a means of pacification and integration (cf. Müller / Uhlmann 2013: 17–25). Certain sub-genres of legislative texts may also serve functions defined by the intertextual setting in which legislative texts exist. Certain statutes, for instance, serve the specific purpose of incorporating legal rules set up in an international context into the national corpus of law. Most regulations, on the other hand, serve the function of further specifying the legal rules set up in a statute (primary vs. secondary legislation).

Within such genre-specific institutional settings, individual legislative texts can then be described as being aimed at regulating specific aspects of life and at bringing about specific changes to society and its physical environment (e. g. protecting forests from human exploitation or providing better care for the elderly). The individual segments of a legislative text can in turn be interpreted as making specific contributions to the global function of the text, thus serving local functions of their own, such as prohibiting certain actions, granting certain rights, delegating a certain matter to be dealt with by a subordinate legislative body or generally informing readers on the contents of the text and on the date of its commencement. In text linguistics, this recursive functionality of texts has sometimes been referred to as their "illocutionary structure" (cf. Motsch 1996).

[1] Swiss federal laws are drafted in equally authentic versions in German, French and Italian. Particularly important statutes and regulations are also translated into Romansh and English. All examples in this chapter are presented in the German original and translated into English. If available, I have used the official translation provided by the Swiss Federal Chancellery; in all other cases, the translation is my own.

Legislative drafters face the task of making the functions fulfilled by the text as a whole as well as by its individual segments transparent. Several genre-specific means are available to them to achieve this goal. However, these means need to be employed carefully and with respect to the general principles of text comprehension in order to properly serve their purpose. In what follows, I will briefly discuss three elements that can foster or obstruct the transparency of the functional structure of legislative texts depending on how they are realised: (a) statements of purpose, (b) modality and (c) definitions of terms.

a) Statements of purpose

The global functions of legislative texts generally become apparent from their title and from specific provisions inserted at the beginning of a text which state the aim the legislator pursues with the text. The titles of legislative texts usually do not just name the topic of the text but also indicate the genre and sub-genre to which the respective text belongs. They thus provide some first information on the general function of the text, as can be seen in the following title typical for Swiss federal legislation, which includes both the sub-genre ("Federal Act") and the subject matter regulated in the text ("Film Production and Film Culture"):[2]

Bundesgesetz über Filmproduktion und Filmkultur	**Federal Act on Film Production and Film Culture**

Sometimes, the title also indicates the aim that the legislator pursues with the respective piece of legislation. If, as in the above example, the aim pursued by the legislator does not become evident from the title of the text, it may be made transparent by an explicit statement of purpose. Depending on the drafting tradition to which the text belongs, such a statement may be realised as a preamble to the text or as a part of the text itself. The aforementioned Federal Act on Film Production and Film Culture, for instance, includes as its first article the following statement of purpose:

Art. 1 Zweck Dieses Gesetz soll die Vielfalt und Qualität des Filmangebots sowie das Filmschaffen fördern und die Filmkultur stärken.	**Art. 1** Aim This Act is intended to promote the diversity and quality of the films on offer and the creation of films and to strengthen film culture.

However, a statement of purpose can only fulfil its role if it really does name the aim of the respective piece of legislation and not merely state the subject matter of the text. The latter is the case, for instance, in the following provision from the Ordinance of the Minimal Requirements for the Premises of Gun Shops:[3]

[2] Bundesgesetz vom 14. Dezember 2001 über Filmproduktion und Filmkultur (SR 443.1).

[3] Verordnung vom 21. September 1989 über die Mindestanforderungen für Geschäftsräume von Waffenhandlungen (SR 514.544.2).

Art. 1 Zweck Diese Verordnung legt die Mindestanforderungen an die Geschäftsräume fest, über die ein Inhaber oder eine Inhaberin einer Waffenhandelsbewilligung verfügen muss.	**Art. 1** Aim This Ordinance determines the minimal requirements for the business premises that the holder of an arms trade licence must possess.

This provision does not contribute to the transparency of the text as, given the title of the ordinance, it merely states the obvious. The aim pursued by the legislator only becomes clear to readers once they inspect the remainder of the text: the ordinance is obviously intended to prevent weapons from falling into the wrong hands. The example illustrates that drafting instruments must be employed carefully and according to their true purpose if they are to have any effect on the clarity of a text.

b) Modality

The function of legislative texts materialises most immediately in the individual provisions they contain. Traditionally, the normative function of these provisions has been made transparent by the use of modal verbs such as the English *shall* (cf. Williams 2006). In contrast, many modern drafting guidelines suggest that this function can be safely inferred from the text genre and thus needs not be made explicit: "Legislation is compulsory, it introduces commands that must be complied with anyway. The use of 'shall' […] is therefore superfluous. […] Where there is no discretion, a duty is introduced by the present tense or 'must'" (Xantaki 2014: 124, 151). It remains to be asked under what circumstances the present tense is to be used and when the modal verb *must.*

For one, the use of *must* can make it transparent that the state places a duty to act on a third person rather than committing himself to such action. This drafting technique has been applied, for instance, in Article 6 of the Swiss Ordinance on Viticulture and the Import of Wine[4] (emphasis added):

Art. 6 Widerrechtlich gepflanzte Reben [1] Der Kanton verfügt die Beseitigung widerrechtlich angepflanzter Reben. [2] Die Bewirtschafterin bzw. der Bewirtschafter oder die Grundeigentümerin bzw. der Grundeigentümer *muss* die Reben innerhalb von zwölf Monaten nach Erhalt der kantonalen Verfügung beseitigen. Nach unbenutztem Ablauf dieser Frist beseitigt der Kanton die Reben auf Kosten des Fehlbaren.	**Art. 6** Illegally planted vines [1] The Canton orders the removal of illegally planted vines. [2] The manager or owner of the land *must* remove the vines within twelve months after having received the cantonal order. After the deadline has elapsed unused, the Canton removes the vines at the expense of the culpable person.

[4] Verordnung vom 14. November 2007 über den Rebbau und die Einfuhr von Wein (SR 916.140).

In this example, the use of *must* marks a shift of perspective. In paragraph 1, the state commits itself to ordering the removal of illegally planted vines: the Canton is given the right and duty to do so. In contrast, the first sentence of paragraph 2 obliges a private individual (the manager or owner of the land) to remove the vines within a certain amount of time. As the state can neither foresee nor guarantee that said person will do as ordered, the use of *must* rather than plain indicative seems appropriate for this provision. The second sentence of paragraph 2 then shifts the perspective back to the state, committing it to removing the vines if the manager or owner of the land has not done so in time. The alternation between the indicative and *must* thus makes it transparent what types of speech act the individual provisions represent: paragraph 1 and the second sentence of paragraph 2 constitute commissives and the first sentence of paragraph 2 a directive speech act (cf. Searle 1979).

The use of the modal verb *must* may also serve to disambiguate between obligations on the one hand and legal definitions, legal assumptions and legal fictions on the other hand. This phenomenon can be observed, for instance, in Article 5 paragraph 2 of the Swiss Federal Constitution[5] (emphasis added):

Staatliches Handeln *muss* im öffentlichen Interesse liegen und verhältnismässig sein.	State activities *must* be conducted in the public interest and be proportionate to the ends sought.

Even though this provision represents a commitment of the state to adhere to certain principles and would thus normally be formulated in the indicative, it is phrased with the modal verb *must.* The motivation for this deviation from custom can be surmised once the modal verb is omitted from the sentence:

Staatliches Handeln liegt im öffentlichen Interesse und ist verhältnismässig.	State activities are conducted in the public interest and are proportionate to the ends sought.

This version of the provision does not make it sufficiently clear whether state activities must be conducted in the public interest etc. (obligation) or whether state activities are to be considered, by definition, as conducted in the public interest etc. (legal fiction). In this example, the modal verb *must* has thus apparently been used to make it transparent which of the two possible speech acts the provision represents. Both examples therefore demonstrate that, while it may not always be necessary to make the modality of provisions explicit, the use of the modal verb *must* may, at times, improve the transparency of a legislative text: it can disambiguate between speech acts and thus increase the chances that a certain provision will be interpreted as intended.

[5] Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999 (SR 101).

c) Definitions of terms

The illocutionary structure of a legislative text may also be obscured if material provisions are hidden in definitions of terms. This was the case, e. g., in the following provision from an early draft of the Ordinance of the Swiss Federal Department of the Interior on the Promotion of Films[6] (emphasis added):

Art. 2 Begriffe	**Art. 2** Terms
In dieser Verordnung bedeutet:	In this Ordinance:
a. "Projektbeitrag": eine Finanzhilfe an die Kosten für ein einmaliges, zeitlich und örtlich begrenztes Vorhaben;	a. "project contribution" means a financial aid towards the costs of a single, localised and temporary undertaking;
b. "Strukturbeitrag": eine Finanzhilfe an die laufenden Betriebskosten eines Unternehmens, *das regelmässig öffentliche Aufgaben erfüllt.*	b. "structural contribution" means a financial aid towards the on-going operating costs of a company *that regularly exercises public functions.*

While this provision serves two purposes, only one of them is transparent from outset: to delineate the meanings of the terms "project contribution" and "structural contribution". However, the provision does more than that: by specifying, under letter *b*, that a structural contribution is not just a financial aid towards the on-going operating costs of any company but specifically to a company "that regularly exercises public functions", it also stipulates who is eligible for this type of contributions in the first place. In a later draft, this hidden material provision was made transparent in a statement of its own:

Art. 2 Begriffe	**Art. 2** Terms
In dieser Verordnung bedeutet:	In this Ordinance:
a. "Projektbeitrag": eine Finanzhilfe an die Kosten für ein einmaliges, zeitlich und örtlich begrenztes Vorhaben;	a. "project contribution" means a financial aid towards the costs of a single, localized and temporary undertaking;
b. "Strukturbeitrag": eine Finanzhilfe an die laufenden Betriebskosten eines Unternehmens.	b. "structural contribution" means a financial aid towards the on-going operating costs of a company.
Art. 17 Förderbare Unternehmen	**Art. 17** Eligible companies
Strukturbeiträge können nur von Unternehmen beantragt werden, die regelmässig Aufgaben im öffentlichen Interesse erfüllen.	Structural contributions may only be applied for by companies that regularly exercise public functions.

Textual transparency can thus also be facilitated by not conflating multiple speech acts into a single provision, especially if these speech acts represent different types of norms (e. g. legal definitions vs. material requirements). Readers are then more likely to find the information they are looking for. In the example discussed above, readers will find it easier to recover information on who is eligible to apply for a certain type

[6] Verordnung des EDI vom 21. April 2016 über die Filmförderung (SR 443.113).

of financial aid if those requirements are stated explicitly rather than hidden in a definition of terms.

2. Thematic structure

A second layer of textual structure derives from the fact that texts are usually meant to provide their readers with information on some topic (cf. Lötscher 1987). However, the problem that anyone composing a text faces is that, while topics are multidimensional semantic entities, texts are mostly two-dimensional. The overall topic of a text will thus have to be further developed (or rather "unfolded"): it will have to be broken down into sub-topics and sub-sub-topics (segmentation), and these sub-topics and sub-sub-topics will have to be brought into a sequential order (linearisation). The result of this process is what text linguistics refers to as the thematic structure of a text (cf. Brinker 2010: 40–56). It covers both the large-scale ordering of contents at the level of chapters and sections as well as the local ordering of contents at the level of individual paragraphs and sentences.

Studies have shown that the comprehensibility of a text can be fostered (a) by arranging its contents in a sequential order that supports readers in building a coherent mental model of these contents and (b) by making the order by which the contents have been arranged transparent at the surface level of the text (cf. Christmann 2008: 198 f.; Lorch 1989). In what follows, I will give some examples of how this dual insight can be applied in legislative drafting.

a) Linearisation

The order in which the contents of a text are linearised can have an impact on how easy it is for readers to find relevant information and to construct a coherent mental model of what the text says. To find an optimal sequential order, drafters need to consider both the potential expectations of the primary addressees as well as the general cognitive principles of human information processing. With regard to the latter, one approach to arranging the contents of a text has proven particularly beneficial: thematic continuity (cf. Schnotz 1994: 254 ff.; Christmann 2008: 1099). Contents that naturally belong together should, whenever possible, not be broken up and distributed over different parts of a text but rather be presented in one piece. What this may mean for legislative drafting can be illustrated by the Statutes of the Swiss Competition Commission.[7] A first draft of these statutes was organised into the following chapters (in italics) and sections:

Zusammensetzung	*Composition*
Kommission	Commission
Kammern	Chambers
Präsidium	Presidium

[7] Geschäftsreglement der Wettbewerbskommission vom 15. Juni 2015 (SR 251.1).

Aufgaben	*Functions*
Kommission	Commission
Kammern	Chambers
Präsidium	Presidium
Sitzungen	*Meetings*
Kommission	Commission
Kammern	Chambers
Präsidium	Presidium

The draft exhibited a clear structure and the ordering principle it followed was easy to recognise: it first defined how each of the three bodies of the Competition Commission was to be composed, then described the functions that each body fulfils and finally determined how the meetings of each body were to be organised. Nevertheless, the text proved difficult to read. From a cognitive perspective, this was hardly surprising as the order in which the contents had been arranged tore apart what naturally belonged together: instead of dealing with the individual bodies of the commission one at a time, the contents were grouped according to abstract categories that did not form natural units. Readers were forced to go back and forth between the individual bodies when consulting the text. In a later draft, this problem was resolved by imposing thematic continuity and applying an organisational principle that reflected the nature of the objects described more directly (principle of iconicity):

Kommission	*Commission*
Zusammensetzung	Composition
Aufgaben	Functions
Sitzungen	Meetings
Kammern	*Chambers*
Zusammensetzung	Composition
Aufgaben	Functions
Sitzungen	Meetings
Präsidium	*Presidium*
Zusammensetzung	Composition
Aufgaben	Functions
Sitzungen	Meetings

Empirical studies have further shown that texts are easier to understand if they first provide readers with a more general picture and only then move to the details (cf. Christmann 1989). Such an incremental ordering of contents helps readers contextualise the individual information they are given. The following article from an

early draft of the Swiss Ordinance on Swiss Persons and Institutions Abroad[8] may serve to illustrate this point:

Art. 49 Subsidiarität	**Art. 49** Subsidiarity
[1] Natürliche und juristische Personen haben Massnahmen zu treffen, um Notlagen vorzubeugen, insbesondere indem sie die nationale Gesetzgebung des Empfangsstaates und die Empfehlungen des Bundes beachten und für einen ausreichenden Versicherungsschutz sorgen.	[1] Individuals and legal entities must take steps to avoid running into difficulty, in particular by complying with the national legislation of the receiving state and following the Confederation's recommendations as well as ensuring adequate insurance cover.
[2] Die natürliche oder juristische Person muss alle Handlungen vornehmen, die von ihr im Sinne der Eigenverantwortung zu erwarten sind, um eine Notlage selber organisatorisch und finanziell zu überwinden. Die im Empfangsstaat zur Verfügung stehenden Hilfeleistungen sind soweit zumutbar in Anspruch zu nehmen.	[2] Before requesting assistance, individuals and legal entities must do everything that may be expected of them in terms of personal responsibility to overcome their difficulties from an organisational and financial point of view on their own. Where reasonable, use should be made of any assistance available in the receiving state.
[3] Schweizer Staatsangehörige können ihre Auslandaufenthalte registrieren. Das EDA stellt die elektronische Datenbank zur Verfügung.	[3] Swiss nationals may register their stays abroad. The FDFA provides an electronic database for this purpose.
[4] Die Schutztätigkeit des Bundes kommt erst dann zum Tragen, wenn eine natürliche oder eine juristische Person aus eigener Kraft oder mithilfe von Dritten die Mittel zur Selbsthilfe ausgeschöpft hat.	[4] The Confederation shall only provide protection after individuals or legal entities have exhausted every means of helping themselves, either on their own or with the help of third parties.

In this article, specific duties and general principles follow each other in seemingly random order. The general principle that the article deals with, i. e. the subsidiary nature of the protection that the Swiss Confederation provides to its citizens abroad, is only stated in the last paragraph of the article. However, since all other provisions in the article constitute instantiations of this general principle and will thus have to be interpreted in light of this principle, the article was later re-arranged as follows:

Art. 49 Subsidiarität	**Art. 49** Subsidiarity
[1] Die Schutztätigkeit des Bundes kommt erst dann zum Tragen, wenn eine natürliche oder eine juristische Person aus eigener Kraft oder mithilfe von Dritten die Mittel zur Selbsthilfe ausgeschöpft hat.	[1] The Confederation shall only provide protection after individuals or legal entities have exhausted every means of helping themselves, either on their own or with the help of third parties.
[2] Die natürliche oder juristische Person muss zuvor alle Handlungen vornehmen, die von ihr im Sinne der Eigenverantwortung zu erwarten	[2] Before requesting assistance, individuals and legal entities must do everything that may be expected of them in terms of personal re-

[8] Verordnung vom 7. Oktober 2015 über Schweizer Personen und Institutionen im Ausland (SR 195.11).

sind, um eine Notlage selber organisatorisch und finanziell zu überwinden. Die im Empfangsstaat zur Verfügung stehenden Hilfeleistungen sind soweit zumutbar in Anspruch zu nehmen.
[3] Natürliche und juristische Personen haben Massnahmen zu treffen, um Notlagen vorzubeugen, insbesondere indem sie die nationale Gesetzgebung des Empfangsstaates und die Empfehlungen des Bundes beachten und für einen ausreichenden Versicherungsschutz sorgen.
[4] Schweizer Staatsangehörige können ihre Auslandaufenthalte registrieren. Das EDA stellt die elektronische Datenbank zur Verfügung.

sponsibility to overcome their difficulties from an organisational and financial point of view on their own. Where reasonable, use should be made of any assistance available in the receiving state.
[3] Individuals and legal entities must take steps to avoid running into difficulty, in particular by complying with the national legislation of the receiving state and following the Confederation's recommendations as well as ensuring adequate insurance cover.
[4] Swiss nationals may register their stays abroad. The FDFA provides an electronic database for this purpose.

In its re-arranged version, the article moves from the general principle to ever more specific requirements. This makes it easier for readers to recognise the rationale underlying the individual provisions and to contextualise the information provided. The overall topic of the article thus becomes more transparent.

b) Signposting

Even the best organisational principle can be in vain if the readers of the text are not able to recognise it. It is thus crucial that drafters indicate the thematic organisation of statutes and regulations on the surface level of the text. The textual conventions of legislative drafting equips them with several instruments to provide signposts for the readers (cf. Hamann 2015).

One option is to provide a content statement and thus give readers a first overview of the main topics covered by a legislative text. Depending on drafting conventions, content statements may precede the actual text (e. g. the so-called "long title" in UK acts; cf. Xanthaki 2014: 139 f.) or constitute the first "provision" of a statute or regulation. A content statement of the latter kind can be found, for instance, at the beginning of the Swiss Federal Act on Foreign Nationals:[9]

Art. 1 Gegenstand
Dieses Gesetz regelt die Ein- und Ausreise, den Aufenthalt sowie den Familiennachzug von Ausländerinnen und Ausländern in der Schweiz. Zudem regelt es die Förderung von deren Integration.

Art. 1 Subject matter
This Act regulates the entry and exit, residence and family reunification of foreign nationals in Switzerland. In addition, it regulates encouraging their integration.

[9] Bundesgesetz vom 16. Dezember 2005 über die Ausländerinnen und Ausländer (SR 142.20).

While content statements may not constitute proper legal norms, they can still be useful as so-called "advance organisers": readers are introduced to the main contents and the overall structure of the text. Thus, they are later better able to conceptualise the information they encounter as they already know what to expect (cf. Ausubel 1960; Schnotz 1994: 280–282; Christmann 2000: 120).

However, the most conspicuous type of signposts legislative drafters can employ are chapter and section headings. Headings best serve their function if they make transparent what the respective text segment is about and how it relates to the other segments of the text. This was not the case, for instance, for the following headings in an early draft of the Swiss Ordinance on the Import, Transit and Export of Animals and Animal Products from and to Third Countries:[10]

2. Abschnitt: Kontrollen bei der Ein- und Durchfuhr	**Section 2: Controls in the cases of import and transit**
Art. 36 Umfang der grenztierärztlichen Kontrollen bei der Einfuhr Die grenztierärztliche Kontrolle umfasst für jede Sendung: …	**Art. 36** Extent of border veterinary controls in the case of import Border veterinary controls comprise for each shipment: …
Art. 37 Durchfuhrsendungen Die grenztierärztliche Kontrolle umfasst für jede Sendung: …	**Art. 37** Transit shipments Border veterinary controls comprise for each shipment: …

The wording of these headings obscured the thematic structure of the text in several ways. First, the section heading provided redundant information. According to the communicative principle of relevance as described, in various forms, by linguistic pragmatics (cf. Grice 1975; Sperber / Wilson 1996), the fact that the restrictive attribute *in the cases of import and transit* was added to the section heading suggested that there were controls other than those covered by the current section; however, this was not the case. The attribute was therefore not only superfluous but potentially misleading. On the other hand, the section heading omitted information that was crucial to understanding the subject matter of the section: The section did not define border veterinary controls in general but only the *extent* of these controls – as indicated by the heading of Article 36 (*extent of …*) and the use the verb *comprise* in the two provisions. Third, the variation found in the wording of the two article headings obscured the fact that they contained parallel provisions, with Article 36 applying to import and Article 37 to transit. Finally, the provisions themselves were phrased in a way that made it impossible for readers to know what they applied to without taking the article heading into account. As a general rule, though, readers should be able to derive the content of a provision from the actual text; headings should

[10] Verordnung vom 18. November 2015 über die Ein-, Durch- und Ausfuhr von Tieren und Tierprodukten im Verkehr mit Drittstaaten (SR 916.443.10); the example has been slightly simplified.

merely serve as signposts and not constitute a part of the provision itself. For these reasons, headings and text were later re-cast as follows:

2. Abschnitt: Umfang der Kontrollen	**Section 2: Extent of the controls**
Art. 36 Einfuhr Bei der Einfuhr umfasst die grenztierärztliche Kontrolle für jede Sendung: …	**Art. 36** Import In the case of import, border veterinary controls comprise for each shipment: …
Art. 37 Durchfuhr Bei der Durchfuhr umfasst die grenztierärztliche Kontrolle für jede Sendung: …	**Art. 37** Transit In the case of transit, border veterinary controls comprise for each shipment: …

In this form, the headings now indicate much more succinctly the topics of the respective text segments and the way these topics are related to each other. The thematic structure of the text thus becomes more transparent.

3. Propositional structure

A third layer of structure emerges from the propositional content of a text, i. e. from the individual statements the text makes and the way these statements are logically connected to each other. In order to comprehend the propositional structure of a text, readers must be able to recognise what real-world entities it refers to and what logical relations it establishes between them (cf. Brinker 2010: 22–40). Many legal provisions express a conditional relation of some kind, i. e. they link some conditions (e. g. certain situations, objects or people) to some legal consequences (e. g. certain rights or duties). Moreover, most legal provisions are related to other provisions in the text (e. g. they constitute exceptions or concretisations to a more general provision or pose additional constraints on a process already introduced at an earlier point). Thus, for readers to understand the propositional content of a legislative text, it is essential that they recognise not only the internal structure of the individual provisions listed in that text but also the way that these provisions are connected to each other. In sum, legislative drafters face the dual challenge of making it transparent (a) what logical relations hold both within and between the individual provisions of a statute or regulation and (b) what entities these provisions refer to.

a) Relations

Experience shows that in order to make the relations holding within and between legal provisions transparent, it is advisable to aim for iconicity, i. e. the surface structure of the text is to reflect the structure of its content as directly as possible (cf. Lötscher 2008). First and foremost, this means that the wording of individual provisions should clearly distinguish between condition and consequence and accurately describe the logical relation holding between them. This was not the case, for exam-

ple, in the following provision from a draft of the Swiss Federal Act on Explosive Materials:[11]

Vorgesetzte von Betrieben oder Unternehmen, in denen sich beim Umgang mit Sprengmitteln oder pyrotechnischen Gegenständen eine Explosion mit Personen oder erheblichem Sachschaden ereignet, haben unverzüglich die Polizei zu informieren.	Supervisors of companies or enterprises in which the handling of explosives or pyrotechnical articles leads to an explosion that causes personal or severe material damage must immediately notify the police.

The wording of this provision does not accurately represent the conditional structure of the legal norm that it is meant to convey, namely that if in a company or enterprise the handling of explosives or pyrotechnical articles leads to an explosion that causes personal or severe material damage, the supervisors must immediately notify the police. The use of a noun phrase modified by a relative clause rather suggests that the provision applies to a certain class of supervisors ("supervisors of companies or enterprises in which the handling of explosives or pyrotechnical articles leads to an explosion that causes personal or severe material damage") and that these supervisors have a specific duty ("must immediately notify the police"). However, in the conditional relation that the provision is meant to describe, the supervisors do not form part of the condition but only appear in the legal consequence. In a later version of the text, the provision was re-phrased in a more iconic manner, thus making the logical structure of the underlying norm transparent:

Ereignet sich in Betrieben oder in Unternehmen beim Umgang mit Sprengmitteln oder pyrotechnischen Gegenständen eine Explosion mit Personen- oder erheblichem Sachschaden, so haben die Vorgesetzten unverzüglich die Polizei zu informieren.	If in a company or enterprise the handling of explosives or pyrotechnical articles leads to an explosion that causes personal or severe material damage, the supervisors must immediately notify the police.

The principle of iconicity can also be applied to the structuring of paragraphs and articles. This can be illustrated with the following article from the Federal Supreme Court Act:[12]

Art. 10 Unvereinbarkeit [1] Die Richter und Richterinnen dürfen weder der Bundesversammlung noch dem Bundesrat angehören und in keinem anderen Arbeitsverhältnis mit dem Bund stehen. [2] Sie dürfen weder eine Tätigkeit ausüben, welche die Erfüllung der Amtspflichten, die Unabhängigkeit oder das Ansehen des Ger-	**Art. 10** Incompatibility [1] The judges of the Court may not be members of the Federal Assembly, the Federal Council or otherwise be employed by the Confederation. [2] They may not engage in any activity that impairs their ability to fulfil the duties of their office or is injurious to the independence or the

[11] Bundesgesetz vom 25. März 1977 über explosionsgefährliche Stoffe (SR 941.41).

[12] Bundesgesetz vom 17. Juni 2005 über das Bundesgericht (SR 173.110).

ichts beeinträchtigt, noch berufsmässig Dritte vor dem Bundesgericht vertreten.	reputation of the Court nor professionally represent third parties at the Court.
[3] Sie dürfen keine amtliche Funktion für einen ausländischen Staat ausüben und keine Titel oder Orden ausländischer Behörden annehmen.	[3] They may not serve in any official capacity on behalf of a foreign state and not accept any titles or orders from foreign authorities.
[4] Die ordentlichen Richter und Richterinnen dürfen kein Amt eines Kantons bekleiden und keine andere Erwerbstätigkeit ausüben. Sie dürfen auch nicht als Mitglied der Geschäftsleitung, der Verwaltung, der Aufsichtsstelle oder der Revisionsstelle eines wirtschaftlichen Unternehmens tätig sein.	[4] The permanent judges may not hold office in a canton or engage in any other gainful activity. They may not be members of the management board, board of directors, advisory board or serve as auditors of a commercial enterprise.

The surface structure of this article does not reflect the semantic structure of the provisions it contains. While the surface structure falls into four paragraphs, the underlying propositional structure consists of only two elements: a general rule detailing the activities that are incompatible with the office of any kind of judge and a special rule detailing the activities that are additionally incompatible with the office of a permanent judge. The general rule is spread out over the first three paragraphs of the article, the special rule is contained in the fourth paragraph. A more iconic representation of the two rules could have looked as follows:

Art. 10 Unvereinbarkeit	**Art. 10** Incompatibility
[1] Die Richter und Richterinnen dürfen nicht:	[1] The judges of the Court may not:
a. der Bundesversammlung noch dem Bundesrat angehören oder in keinem anderen Arbeitsverhältnis mit dem Bund stehen;	a. be members of the Federal Assembly, the Federal Council or otherwise be employed by the Confederation;
b. eine Tätigkeit ausüben, welche die Erfüllung der Amtspflichten, die Unabhängigkeit oder das Ansehen des Gerichts beeinträchtigt, oder berufsmässig Dritte vor dem Bundesgericht vertreten;	b. engage in any activity that impairs their ability to fulfil the duties of the office or is injurious to the independence or the reputation of the Court or professionally represent third parties at the Court;
c. eine amtliche Funktion für einen ausländischen Staat ausüben oder Titel oder Orden ausländischer Behörden annehmen.	c. serve in any official capacity on behalf of a foreign state or accept any titles or orders from foreign authorities.
[2] Die ordentlichen Richter und Richterinnen dürfen zudem nicht:	[2] The permanent judges may also not:
a. ein Amt eines Kantons bekleiden oder eine andere Erwerbstätigkeit ausüben;	a. hold office in a canton or engage in any other gainful activity;
b. als Mitglied der Geschäftsleitung, der Verwaltung, der Aufsichtsstelle oder der Revisionsstelle eines wirtschaftlichen Unternehmens tätig sein.	b. be members of the management board, board of directors, advisory board or serve as auditors of a commercial enterprise.

In this version of the article, the propositional structure is more transparent: the two paragraphs at the surface level reflect the two-part nature of the underlying norm, and the adverb *also* in the second paragraph makes it clear that the second provision applies in addition rather than instead of the first.

b) Reference

The propositional structure of a text may also be difficult to grasp if it is not clear what entities the individual propositions refer to. One linguistic phenomenon that frequently obstructs the process of reference resolution are bridging references. A bridging reference is an anaphoric expression that does not refer to its antecedent explicitly (e. g. *a house … the house/it*) but rather alludes to it implicitly (e. g. *a house … the chimney*). In order to resolve a bridging reference, readers need to have specific world knowledge at their disposal (e. g. that houses have chimneys). If the resolution of a bridging reference requires too much knowledge or too much cognitive effort on the part of the readers, it can hinder the process of text understanding. The following excerpt from the draft of a partial revision of the Swiss Federal Electricity Act[13] contained such a counter-productive bridging reference (emphasis added):

Art. 18 Das Bundesamt für Energie kann Projektierungszonen festlegen, um Grundstücke für künftige Starkstromanlagen freizuhalten.	**Art. 18** The Federal Office of Energy may define development zones in order to keep properties clear for future power installations.
Art. 20 Kommen *Eigentumsbeschränkungen nach Artikel 18* einer Enteignung gleich, so sind sie voll zu entschädigen.	**Art. 20** If *ownership restrictions according to Article 18* are equivalent to expropriation, full compensation has to be made.

The provision in Article 20 refers to some "ownership restrictions" supposedly introduced in Article 18. However, Article 18 does not explicitly mention any "ownership restrictions". Readers will only be able to resolve this reference if they realise that the definition of development zones described in Article 18 can result in an ownership restriction, as land owners would, for instance, not be able to use their land to build a house anymore. The resolution of the reference thus requires considerable knowledge and cognitive effort. The situation was remedied in a later draft by replacing the bridging reference in Article 20 with an explicit reference to the notion of defining development zones and to the fact that it can result in an ownership restriction (emphasis added):

[13] Elektrizitätsgesetz vom 24. Juni 1902 (SR 734.0).

Art. 18 Das Bundesamt für Energie kann Projektierungszonen festlegen, um Grundstücke für künftige Starkstromanlagen freizuhalten.	**Art. 18** The Federal Office of Energy may define development zones in order to keep properties clear for future power installations.
Art. 20 *Führt die Festlegung einer Projektierungszone zu einer Eigentumsbeschränkung*, die einer Enteignung gleichkommt, so ist diese voll zu entschädigen.	**Art. 20** If *the definition of a development zone results in an ownership restriction* equivalent to expropriation, full compensation has to be made.

The propositional structure of a legislative text is also obscured if the wording of a provision wrongly creates the impression that it refers to an entity that has been introduced into the discourse elsewhere, while it actually merely presupposes that entity's existence. An example of such a presupposition could be found in the draft of a bill to change the Swiss Railway Act[14] (emphasis added):

Die Weiterentwicklung der Bahninfrastruktur erfolgt im Rahmen *des Entwicklungsprogrammes des Bundes* und gemäss den folgenden Zielen: …	The railway infrastructure is further developed within the framework of *the development programme of the Confederation* and according to the following goals: …

The use of the definite article *the* with the noun phrase *federal development programme* implies that said programmes are already known to the reader, either because they have already been mentioned or because they constitute common knowledge. In reality, neither was the case. Effectively, the use of a definite noun phrase thus introduced an implicit norm, providing that the Confederation is obliged to have a federal development programme. In a later version of the draft, this obligation was made transparent by inserting an explicit provision for the content that was merely presupposed in the previous draft (emphasis added):

[1] Die Weiterentwicklung der Bahninfrastruktur hat folgende Ziele: … [2] *Der Bundesrat unterbreitet der Bundesversammlung in regelmässigen Abständen Programme zur Weiterentwicklung der Bahninfrastruktur (Entwicklungsprogramme).* [3] In den Entwicklungsprogrammen zeigt er auf, wie er die Ziele erreichen will.	[1] The railway infrastructure is further developed according to the following goals: … [2] *The Federal Council periodically submits programmes for the further development of the railway infrastructure (development programmes) to the Federal Assembly.* [3] In the development programmes, the Federal Council outlines how it intends to accomplish the goals.

Presuppositions do not only constitute an impediment to text understanding but may also infringe on the constitutional principle of legality. This principle states, among other things, that the law must be specific enough for those who are subject

[14] Eisenbahngesetz vom 20. Dezember 1957 (SR 742.101).

to it to be able to recognise what they may or may not do. Presuppositions will thus not always provide sufficient legal grounds for a norm to be enforced (cf. Höfler 2014, 2017).

IV. Transparent drafting in a globalised world

An increasingly globalised world poses both a threat and a challenge for the goal of transparency in legislative drafting. Intertextual connections between different pieces of legislation more and more transcend the borders of national law. But if national law will increasingly have to be interpreted in the context of international treaties, then national legislators lose significant influence over how transparent their law will be. In this context, it would be all too easy to give up on the goal of transparency altogether. Indeed, an argument one occasionally hears is that if the nation state has to incorporate a piece of supranational legislation that has been drafted in non-transparent language, then it is easier to simply copy this piece of legislation rather than to come up with one's own alternative wording. The resulting national law might not be transparent but at least it would presumably also not deviate from the (obscured) intentions of the supranational legislator.[15] This argument is, of course, doubly flawed. First, any transplanting of a piece of text from one context into another will automatically effect its meaning: legislative statements can never be interpreted in isolation but must always be read with regard to the context in which they appear. Second, even if this workaround did guarantee textual equivalence, it would lead to the proliferation of non-transparent language and thus jeopardise the quality of legislation at large. To prevent such dynamics, it is thus important that legislators make plain-language drafting a priority.

However, this goal can only be achieved if we know what it takes for a legislative text to be transparent in the first place: it is vital that both the legal and the language sciences work together and develop concepts and methods to help drafters fulfil their task. Scientific studies of legislative drafting are still comparatively sparse. Law scholars as well as linguists still mostly focus on questions related to the interpretation of the law and thereby neglect the perspective of composition. Above, I have shown how the insights of text linguistics can be applied to improve the clarity of legislative texts. Text linguistics has the advantage that it combines insights into general cognitive mechanisms of language understanding with a realisation that, as means of communication, texts are heavily influenced by the conventions of their genre and the institutional setting in which they are used. Its concepts and methods are thus apt, maybe more so than those of other approaches to language, to be applied in an interdisciplinary environment like the one at hand. In a globalised world, how-

[15] For a discussion of the pros and cons of this practice see e. g. the Swiss Federal Administration's rules of thumbs for the implementation of EU law in national law (available online at: www.bk.admin.ch > Dokumentation > Rechtsetzungsbegleitung > Übernahme von EU-Recht: Formale Aspekte > Hilfsmittel > Faustregeln für die Umsetzung von EU-Recht in Schweizerisches Recht).

ever, such efforts will have to transcend the boundaries of national conventions and languages. What is ultimately needed is a general theory of legislative drafting that includes legal as well as linguistic aspects and that is capable of capturing the legal and cognitive properties underlying all legislation, independent of the legal system and language in which it has been drafted.

V. Literature

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